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Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

GEORGE VAKALIS,
Petitioner,

v.

EUGENE M. KAGAN, JACK HEFLIN, ALLEN M. HEFLIN, COUNTRY CLUB ASSOCIATES, EAST STREET MALL ASSOCIATES, E. REUEL STOLTZ, CPA, SPITZ, SULLIVAN, WACHTEL & FALCETTA, INTERSTATE REGIONAL SHOPPING CENTERS, LTD., BERTRAM ROBINSON, HARLAND SHAPIRO, VSR ASSOCIATES, ELAINE G. KAGAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Second Circuit Court of Appeals erred in using the discovery principles under the common law doctrine of fraud, in applying the statute of limitations, to the partial discovery of the conspirators' initial agreements to participate in the first criminal scheme in a pattern of ongoing and continuous racketeering activity, to vitiate Congress' expressed intent and purpose in allowing a ten year period of time under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1961 (5), in which a victim/future plaintiff may investigate the existence of one or more racketeering schemes to determine the viability of a violation under 18 U.S.C. Section 1961 *et seq.* and institute an action after the point of accrual, but within the proper statute of limitations period.

II. Whether the Second Circuit Court of Appeals erred in applying only a portion of the law regarding the Connecticut statute of limitations to a lawsuit brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1961 *et seq.*, to bar the action, filed by a pro se plaintiff within the ten year period of time provided by 18 U.S.C. Section 1961 (5), when in fact there was no last predicate act, but rather conspiracy agreements with a continuing course of racketeering conduct, which tolls the running of the limitations period under settled Connecticut law and the federal equitable tolling doctrine.

III. Whether the Second Circuit Court of Appeals erred in refusing to apply the proper Connecticut statute of limitations, i.e., that for partnerships, when the majority of defendants in this action were business partners of the plaintiff and thereby in a fiduciary relationship with him, removing the element of surprise and mandating the application of the longer Statute of Limitations period.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable, The Chief Justice and Associate Justices Of The Supreme Court of The United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Second Circuit Court of Appeals, entered in this proceeding on October 10, 1986.

OPINIONS OF THE COURT BELOW

The Opinion of the Court of Appeals is unreported and is set forth in full in the Appendix, pp. 1A to 3A.

The Opinion of the District Court is unreported and is set forth in full in the Appendix, pp. 4A to 11A.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on October 10, 1986. The jurisdiction of this Court for review of this matter by certiorari is conferred on this Court by 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions involved in this case include the Racketeer and Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1961 *et seq.*, and Connecticut General Statutes Sections 52-576 and 52-577.

STATEMENT OF THE CASE

On July 17, 1985, the pro se plaintiff, now petitioner, filed a lengthy complaint involving a federal civil claim pursuant to 18 U.S.C. Section 1961 *et seq.* (hereinafter referred to as "RICO") alleging a criminal conspiracy to destroy him and his business, masterminded and directed by his trusted attorney and partner, defendant Eugene M. Kagan, coupled with various state law claims of common law fraud, fraudulent concealment, negligent misrepresentation, breach of contract and conversion, by seeking thirty-five million dollars in damages, among other requested relief.

On August 26, 1985 a Motion To Dismiss With Memorandum was filed by defendant Eugene M. Kagan, Jack Heflin, Allen M. Heflin, Elaine Kagan, and Country Club Associates.

On September 16, 1985, a Motion To Dismiss With Memorandum was filed by defendant Harland Shapiro.

On September 16, 1985, a hearing was held before United States District Judge Clarie on said defendants' Motion To Dismiss.

On October 21, 1985, a hearing was held on defendant Shapiro's Motion To Dismiss and other defendants' Bond Motions.

On October 23, 1985, the defendant East Street Mall filed a Motion To Dismiss With Memorandum.

On December 9, 1985, a hearing was held on plaintiff's Motion To Amend Complaint to add additional defendants among other motions.

On September 16, 20, October 18, November 15, and December 10, 1985, the plaintiff filed Memorandums In Opposition To The Motions To Dismiss.

On April 11, 1986, the Appearance of Joseph P. Secola for the plaintiff was filed.

On April 16, 1986, the "Rulings On Motions To Dismiss" was filed, which dismissed the Complaint. No discovery by any party had been conducted at this point.

On April 16, 1986, the plaintiff filed a Motion For Extension Of Time to file a brief regarding the plaintiff's previous Motion to add additional party defendants.

On April 21, 1986, judgment was entered in favor of all defendants.

On May 16, 1986, at 10:52 AM the plaintiff filed a Motion For Leave and Motion For Reconsideration Of The "Ruling On Motions To Dismiss."

On May 16, 1986, at 12:17 PM the plaintiff's said Motions For Leave And Reconsideration were denied.

On May 16, 1986, the plaintiff filed his Notice of Appeal from the said orders regarding the "Rulings On Motion To Dismiss," the plaintiff's Motion For Leave and the plaintiff's Motion For Reconsideration.

On October 9, 1986, the plaintiff and defendants, then appellant and appellees argued the appeal before the Second Circuit Court of Appeals.

On October 10, 1986, the Second Circuit Court of Appeals entered a final decision on the appeal in favor of the defendants. It is to be noted that the Second Circuit decision wrongly categorized the lower district court decision as a Ruling on a Summary Judgment Motion, when in fact, the district court ruled on various Motions to Dismiss made pursuant to Federal Rules of Civil Procedure 12(b)(6).

FACTS

The petitioner is a commercial real estate developer who has been defrauded by an extensive pattern of multiple schemes of racketeering activity, out of substantial monies and properties through five partnership enterprises in violation of a number of federal criminal statutes. These partnership entities include Interstate Regional Shopping Centers, East Street Mall Associates, Country Club Associates, VSR Associates (VSR stands for Vakalis, Shapiro and Robinson), and Rockingham Mall.

The various respondents are his partners, his accountant, his attorney, and the five partnership enterprises. The petitioner alleged in his complaint numerous predicate acts and conspiracy agreements occurring between 1977 and continuing and extending up until the present day, as he is presently still being deprived of his monies and properties in the said partnerships. The various respondents have violated various federal criminal statutes of extortion and fraud which form the basis of a civil RICO claim. The petitioner has also sued under state law for common law fraud, fraudulent concealment, negligent misrepresentation, breach of contract and conversion. The respondents to this day are in continual breach of the fiduciary duty that they owe the petitioner. The petitioner has sufficiently plead a RICO cause of action with the required predicate acts, pattern of racketeering activity, and enterprises. The petitioner deserves to have the merits of his case set before a trier of fact: a jury of his peers.

The basis for federal jurisdiction in the original complaint is found under 18 U.S.C. Sections 1964 and 1965.

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

SUMMARY ARGUMENT

Pursuant to Rule 17.1(c) of the Rules of the Supreme Court, the Court should grant this petition and review this case to settle an important question of federal law presently in confusion among the Federal District Courts throughout the Circuits.

In addition to the specific merits of this case, the Court needs to address, for the purposes of formulating a consistent national judicial policy, the crucial issues of (1) when a RICO cause of action accrues thereby starting the appropriate state statute of limitations running against the racketeering victim/future plaintiff and (2) which state statute of limitations is most appropriate to a RICO cause of action.

This case is of great national social concern, as it deals with the pandemic of organized white collar crime rings of professionals in which attorneys and accountants betray their own clients for their own selfish pecuniary gain through various criminal schemes of embezzlement, extortion and fraud. It is this very national problem which Congress sought to redress by the civil provisions of the RICO statute in 1970. Unfortunately, lower courts, lead by the Second Circuit again, are creating judicial barriers to meritorious RICO claims, not of the garden variety kind, in direct disobedience to the mandate of Congress and of this Court in *Sedima, S.P.R.I. v. Imrex Company, Inc.*, ____U.S.____, 105 S.Ct. 3275, 87 L.Ed. 2d 346 (1985).

I.

In applying the state statute of limitations, the Second Circuit Court of Appeals confused the principle of discovery contained within the common law doctrine of fraud, with the time for investigation, discovery and accrual provided in the RICO statute for a RICO cause of action. A common law

concept regulating the point in time at which a limitations period is to be applied and begin to run should not be used to vitiate the time period that Congress has already specifically set forth in the statute for the investigation of possible RICO violations. By this time period, Congress delayed the accrual time of a RICO cause of action for as much of this period as is necessary to allow for this very investigation of the pattern of racketeering activity. This misapplication prevents the institution and maintenance of complex RICO actions, which in reality are timely filed and meritorious.

II.

To dismiss a valid RICO lawsuit, the Second Circuit Court of Appeals surprisingly applied only a portion of Connecticut law, regarding the statute of limitations, to a point in time at which the pro se plaintiff mistakenly believed in good faith, that he learned the existence of the initial conspiracy agreements which was just one of the first of various criminal schemes against him. (In fact, at that point he knew very little and did not learn of the magnitude of the pattern of multiple criminal schemes until much later.) A statute of limitation period can only be applied to the last predicate act, which factually does not exist when there is a continuing course of racketeering conduct. Such conduct tolls the running of the limitations period under settled Connecticut law and the Federal Equitable Tolling Doctrine.

III.

The Second Circuit Court of Appeals should have applied the Connecticut statute of limitations used for partnerships to this RICO lawsuit because the majority of the defendants were business partners of the plaintiff and owed a contractual fiduciary duty to him not to engage in the outrageous conduct which is the subject of this lawsuit as set forth in the complaint. These fiduciary relationships minimize the surprise element which the statute of limitations is designed to guard against, thereby mandating the application of the longer limitations period.

ARGUMENT I

The Second Circuit Court Of Appeals Erred In Using The Discovery Principles Under The Common Law Doctrine Of Fraud, In Applying The Statute Of Limitations, To The Partial Discovery Of The Conspirators' Initial Agreements To Participate In The First Criminal Scheme In A Pattern Of Ongoing And Continuous Racketeering Activity, To Vitiate Congress' Expressed Intent And Purpose In Allowing A Ten Year Period Of Time Under The Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. Section 1961 (5), In Which A Victim/Future Plaintiff May Investigate The Existence Of One Or More Racketeering Schemes To Determine The Viability Of A Violation Under 18 U.S.C. Section 1961 et seq. And Institute An Action After The Point Of Accrual, But Within The Proper Statute Of Limitations Period.

When Congress first enacted the RICO statute in 1970, they provided for a ten (10) year period of time in which an ongoing pattern of racketeering activity could develop. This time period has remained unchanged to the present day. It was certainly logical to assume that if two or more predicate acts did not occur within this ten year time period, then a pattern of racketeering probably did not exist which could be addressed by their new statute. *Sedima, S.P.R.I. v. Imrex Company, Inc.*, ____U.S.____, 105 S.Ct 3275, 3286, 87 L.Ed. 2d 346 (1985).

In other words, Congress specifically provided as much of this ten year period as is necessary in which a racketeering victim could assess the possibilities of whether certain violations have occurred which could be addressed under RICO. The very nature of racketeering conduct involves clandestine operations which if they are ever discovered, are only uncovered via small bits of information at any one time. This is especially true when the covert racketeering operations are part of an ongoing form of business conduct. As piecemeal information may accidentally come to light, immediate

cover-up attempts would be implemented to prevent total discovery, lest the entire operation, both present and future, be destroyed. It is to be noted that a civil plaintiff is further handicapped by not having the government's ability to use the pre-indictment covert discovery procedures such as wiretapping, etc.

The result of this type of conduct would make it extremely difficult for anyone to even be sure that such an enterprise existed, let alone uncover a pattern of racketeering activity. How much more difficult would this job of discovery be if the schemers were those business partners with whom you worked regularly, trusted to the highest degree and relied upon for their utmost commitment and integrity to the success of your business endeavors. Imagine if one of these schemers was your own attorney, with whom you entrusted everything, and who knew everything about your business and personal affairs. Knowing the full extent of your assets and business deals, present and future, imagine further how easy it would be for your own attorney to hide from you secret information and transactions and keep you in the dark as to his covert actions, while you trusted him for wise and honest counsel, which are the facts in the present case. This national problem of white collar crime makes RICO a necessary weapon to battle this problem. "This purpose is not contrary to the intent of Congress but is in fact one of the benefits Congress saw the act as providing. *Cf. Bennett v. Berg,* 685 F.2d 1053, 1063 (8th Cir. 1982), *cert. denied sub nom. Prudential Insurance v. Bennett,* 464 U.S. 1008, 104 S.Ct. 527, 78 L.Ed. 2d 710 (1985) (The legislative history of the Act that RICO is aimed more broadly at criminal activity in the business world)." *Papai v. Cremosnik,* 635 F.Supp 1402, 1411 (ND.Ill. 1986).

Congress did not err in allowing for a ten year window in which a would-be plaintiff could look and investigate to see whether a pattern of criminal conduct was present and developing. This Court and courts throughout the circuits have said that isolated acts are insufficient to establish the "pattern" element necessary for a RICO violation. *Sedima, S.P.R.I. v. Imrex,* ____U.S.____, 105 S.Ct. at 3285 n.14, 87 L.Ed. 2d 346 (1985). The lower courts have almost uniformly interpreted the development of this "pattern of racketeering

activity" to take a fairly long time. "The nature of the crime . . . is such that Congress must assuredly have intended that it be treated as a continuing one. *Toussie v. United States,* 397 U.S. 112, 115, 90 S.Ct. 858, 860, 25 L.Ed. 2d 156 (1970). The language of the Act, which makes a pattern of conduct the essence of the crime, 'clearly contemplates *a prolonged course of conduct.' Id.* at 120, 90 S.Ct. at 863. (emphasis added)" *United States v. Field,* 432 F.Supp. 55 (S.D.N.Y. 1977), *affirmed* 578 F.2d 1371 (2nd Cir. 1978), *certiorari dismissed* 439 U.S. 801, 99 S.Ct. 43, 58 L. Ed.2d 94 (1979). *See, Superior Oil Co. v. Fulmer,* 785 F.2d 252, 255 (8th Cir. 1986) ("a 'pattern of racketeering activity' requires 'related' predicate acts which have 'continuity' in the sense of some *prolonged course of criminal conduct*") (emphasis added); *Sheftelman v. Jones,* 636 F.Supp. 263, 268 (N.D. Ga. 1986) ("the predicate acts in this case did not occur over the *protracted period* present in *Touche Ross.*") (emphasis added); *Bank of America National Trust and Savings Association v. Touche Ross and Co.,* 782 F.2d 966, 971 (11th Cir. 1986) (nine separate acts over a period of three years); *Graham v. Slaughter,* 624 F.Supp. 222, 225 (N.D.Ill. 1985) ("an open ended scheme . . . The fraud was clearly ongoing . . ."); *Papai v. Cremosnik,* 635 F.Supp 1402, 1413 (N.D.Ill. 1986) ("The language of the Act which makes a pattern of conduct the essence of the crime, clearly contemplates *a prolonged course of conduct,*" citing *United States v. Field, infra)* (emphasis added); *Agristor Leasing v. Meuli,* 634 F.Supp. 1208, 1225-26 (D.Kan. 1986) (more than one fraudulent scheme required to establish "pattern," which schemes are separate in time); *Frankart Distributors, Inc. v. RMR Advertising,* 632 F.Supp. 1198, 1201 (S.D.N.Y. 1986) (predicate acts within a single scheme are insufficient to establish "pattern"); *accord, Medallion TV Enterprises, Inc. v. Selec TV, Inc.,* 627 F.Supp. 1290 (C.D. Cal. 1986).

Therefore, a plaintiff must wait and see, while investigating, to determine if there really is a pattern of racketeering before he dare come to court to seek relief under the statute that was enacted to help him in the very situation which the

statute seeks to address. In *Barlow v. McLeod,* No. 85-0022, Dec. 2, 1986, (D.C.D.C. 1986), the Court granted a motion for sanctions under Federal Rule of Civil Procedure 11, because the plaintiff lacked both factual and legal support for his legal claims, as the defendant's conduct did not constitute a pattern of racketeering activity. How can a sincere plaintiff meet his burden under Federal Rule 11 unless he investigates and waits until the pattern of racketeering activity has manifested itself? Coupling this Federal Rule 11 view with the statute of limitations as interpreted by the Second Circuit almost universally bars any plaintiff from seeking redress under the RICO statute, a result neither Congress nor this Court under *Sedima,* has mandated.

The Third Circuit in *Malley-Duff & Associates v. Crown Life Insurance Co.,* 792 F.2d 341, 348 (3rd Cir. 1986), *cert. granted* ____U.S.____, No. 86-531, Dec. 1, 1986 stated "Concepts such as RICO 'enterprise' and 'pattern of racketeering activity' were simply unknown to the common law. . . ." To apply a common law doctrine that the statute of limitations begins to run the moment the plaintiff has an inkling that something is amiss, would serve to deny him the very relief that Congress sought to provide him with. Yet, that is exactly what happened in the court below which applied a three year limitations period to a point in time when Mr. Vakalis first began to discover that there was some clandestine operation being carried on. Since obviously no one came right out and told him what was going on, he had to discover it over time as the enterprise made mistakes and as he became more aware that he was the victim of a criminal plot to destroy him and his business.

The only logical purpose of this ten year window is to reasonably allow the plaintiff the opportunity to perceive that something is wrong, examine the conduct and activities of those involved, study the requirements for a proper RICO violation, determine if a pattern of racketeering activity is present involving two or more criminal episodes containing the requisite number of predicate acts, (or wait until such elements are present) and finally bring the action. To apply the

common law doctrine of discovery and require all this to be done at the plaintiff's first glimpse of the conspiracy, thereby starting the statute of limitations running before the RICO cause of action even accrues, completely vitiates the RICO remedy for injured plaintiffs.

To foreclose injured plaintiffs the justice they should be entitled to under this analysis of applying common law discovery theory as to when the statute of limitations period should begin to run, only serves to reward those criminals who are masters of cover-up. Imagine the hypothetical situation in which in year one the enterprise commits a predicate act which the would be plaintiff discovers. If you have a group of savvy schemers, perhaps even an attorney, as in Mr. Vakalis's situation, all they would have to do in Connecticut, under the statute as sanctioned by the court below, is wait three years before they commit another predicate act. They could be carrying on a very successful racketeering enterprise indefinitely, by simply waiting out the applicable statute of limitations period, or conduct such activities that the plaintiff simply will not discover in the meantime and never be held accountable under RICO. Certainly Congress did not intend to reward such intelligent and well organized criminals, masterminded by a Consigliori at Law.

No, Congress intended RICO to catch and punish these very criminals, yet the courts have made it so difficult for plaintiffs, that extremely meritorious claims are going unheard because the defendants are able to escape liability through malignant techical arguments, such as the inappropriately applied theory of statute of limitations as revealed in this case.

It simply makes no sense in law or in fact for the Congress to provide on one hand a ten year window through which plaintiffs may look to discover, investigate and examine a developing pattern of racketeering activity and gather evidence, only for the courts to then later say that you are forever barred from bringing an action on such injurious conduct because you caught the first glimpse of the pattern of

conduct a couple of years ago, but waited past an unrealistically short statute of limitations period before bringing an action. Should not our courts be in the business of providing injured victims with relief and encouraging plaintiffs to aid our system of justice by elevating the evil deeds of wrongdoers to light?

The simple facts are when Mr. Vakalis first got a glimpse of the possible existence of the racketeering activity perpetuated against him, he had no idea of the complexity, magnitude and scope of the enterprise or its operation and effect. As the schemes continued he learned of the breadth of the racketeering activities and at the point when the schemes were sufficiently developed for him to timely file a proper RICO action, well within the ten year investigatory (in fact only six years) window, the court says he waited too long, dismissed. This mockery of justice should not be sanctioned nor allowed to continue in the courts of our land.

Since Congress failed to prescribe a standard statute of limitations period, the court must look to the state's applicable statute of limitations for application. *Wilson v. Garcia*, ____U.S.____, 105 S.Ct. 1938, 85 L.Ed. 254 (1985) The real concern is when does a RICO cause of action accrue and at what point does the statute begin to run. In light of the need for clear guidance on this federal issue, this Court should review the application of a state's statute of limitations *vis a vis* this ten year window, for those cases involving ongoing racketeering activity, in light of the realities of contemporary criminal enforcement, and settle the confusion in the courts below through a proper interpretation of when a RICO cause of action accrues and therefore when the statute of limitations begins to run. Since in this present case there is no last predicate act on which to apply the statute, and its application to a point in time at the beginning stages of a mere discovery of even only a small portion of the criminal conduct would be patently unfair, as in this case, the need for as much of the investigatory ten year period as is necessary for plaintiffs to analyze and institute RICO actions is vitally essential.

Clearly Congress intended to provide plaintiffs with this necessary time period and the lower courts, who are hostile to RICO actions, are again attempting to cut back and limit the injured plaintiffs' ability to seek the relief which Congress sought to provide, by erecting this judicially created Jericho wall. As it was necessary for the Court to hear and decide the merits in *Sedima, S.P.R.I. v. Imrex Company, Inc.*, ____U.S.____, 105 S.Ct. 3275, 87 L.Ed. 2d 346 (1985), to reprimand the courts for excessively burdening injured plaintiffs with showing extra requirements outside the statute, so it is necessary again for the Court to interpret the RICO statute and guide the lower courts through the establishment of a standard or a national judicial policy regarding the accrual of a RICO cause of action, and the application of a state's statute of limitations.

ARGUMENT II

The Second Circuit Court Of Appeals Erred In Applying Only A Portion Of The Law Regarding The Connecticut Statute Of Limitations To A Lawsuit Brought Under The Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. Section 1961 et seq., To Bar The Action, Filed By A Pro Se Plaintiff Within The Ten Year Period Of Time Provided By 18 U.S.C. Section 1961 (5), When In Fact There Was No Last Predicate Act, But Rather Conspiracy Agreements With A Continuing Course Of Racketeering Conduct, Which Tolls The Running Of The Limitations Period Under Settled Connecticut Law And The Federal Equitable Tolling Doctrine.

The court below decided to apply the Connecticut statute of limitations for the number of years only, but neglected to entertain the rest of the law surrounding the statute of limitations. Applying only a portion of the law is extremely dangerous and can only work an unfair hardship to the party injured thereby. Connecticut and federal courts have positively established that a statute of limitations can be tolled from running in certain circumstances and this caveat should have been considered and applied by the court below.

Connecticut law clearly provides that an ongoing continuing course of conduct tolls the running of the statute of limitation. "When the action sued upon consists of a continuing course of conduct the statute of limitations does not begin to run until the course of conduct is complete" *Hamilton v. Smith,* 773 F.2d 461 (2nd Cir. 1985). *E.g., Ricciuti v. Voltarc Tubes, Inc.,* 277 F.2d 809 (2nd Cir. 1960); *Handler v. Remington Arms Co.,* 144 Conn. 316, 130 A.2d 793 (1957). *Accord, Bartha v. Waterbury House Wrecking Co.,* 190 Conn 8, 459 A.2d 115 (1983). *See, Vilcinskas v. Sears, Roebuck & Co.,* 144 Conn 170, 127 A.2d 814 (1956).

The Court in *Hamilton,* interpreting Connecticut law, went on to state "it is well established in Connecticut that the three-year limit of . . . [Section] 52-584, which usually would begin to run when the wrongful act occurred, will be tolled when 'there is something tantamount to a fraudulent concealment of a cause of action.' " 773 F.2d at 467-68. At the very least, the defendants' conduct and pattern of racketeering certainly involves the requisite level of fraudulent concealment, as well as extortion and a host of other violations.

In order for a state statute of limitations to apply, there has to be a final act to apply it against, so the time clock can begin to run and measure the period in which suit can be brought. Since this statute can be tolled by a continuing course of conduct, this entire concept (statute and exception) can be translated to apply to RICO actions. However, since the conduct and pattern of racketeering is continuing, there can, by definition, be no last predicate act and hence, no beginning time from which the limitations clock can run. "Like the statute of limitations for conspiracies, which runs from the date of the last overt act, *Grundewald v. United States,* 353 U.S. 391, 396-97, 77 S.Ct. 963, 1 L.Ed. 2d 931 (1957), the statute of limitations for violations of the Act [RICO] runs from the date of the last alleged act of racketeering activity." *United States v. Field,* 432 F.Supp. 55, 59 (1977), *affirmed* 578 F.2d 1371 (1978), *certiorari dismissed* 99 S.Ct. 43, 439 U.S. 801, 58 L.Ed. 2d 94 (1979). It is the last overt act by any participant

in the enterprise which is the crucial event. *United States v. Persico*, 621 F. Supp. 842, 872-873 (D.C.N.Y. 1985).

Therefore, there is simply no conceivable way that the court below could have dismissed this case on statute of limitations grounds, because the statute can not be applied in light of the conspiracy agreements and the continuing course of racketeering activity, which by definition, prevents the establishment of a final act of racketeering activity.

ARGUMENT III

The Second Circuit Court Of Appeals Erred In Refusing To Apply The Proper Connecticut Statute Of Limitations, i.e., That For Partnerships, When The Majority Of Defendants In This Action Were Business Partners Of The Plaintiff And Thereby In A Fiduciary Relationship With Him Which Mandates The Application Of The Longer Limitations Period.

The court below should have used Connecticut's six year statute of limitations applicable to partnerships. Conn. Gen. Stat. Section 52-576. The Connecticut Legislature's choice of six years for causes of action involving partnerships evidences Connecticut's concern that those in fiduciary relationships be given more time to pursue their claims as the element of staleness and surprise is not as relevant in a general partnership. Also, as described earlier, it can be more difficult to discover a pattern of racketeering activity in such a fiduciary relationship and more time is therefore needed to properly assess and institute a RICO action.

In this case, all the respondents but one, owed Mr. Vakalis a fiduciary relationship of the highest order. The broad and liberal construction that RICO complaints should be given, suggest that a six year statute of limitations be used to implement the federal policy of effectuating RICO's broad remedial purpose. *Sedima, S.P.R.I. v. Imrex Company, Inc.*, ____U.S.____, 105 S.Ct. 3275, 87 L.Ed. 2d 346 (1985). *See also, Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed. 2d 295 (1975), which held that Congressional and federal policy is paramount and should be the measure in applying state law to federal statutes.

Since the six year statute of limitations, used in fiduciary relationships would effectuate RICO's broad, remedial purposes more effectively, it should have been used in the courts below. *See, Wilson v. Garcia*, ____U.S.____, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985) and *Malley-Duff & Associates v. Crown Life Insurance Co.*, 792 F.2d 341, 351 (3rd Cir. 1986), *cert granted* ____U.S.____, No. 86-531, Dec. 1, 1986.

CONCLUSION

It should be clear that a serious problem exists among the Federal Courts in the accrual of a RICO cause of action and in the application of the appropriate state statute of limitations under RICO. In order for a plaintiff to properly bring a RICO action that will not evaporate on a motion to dismiss, he must make absolutely sure that such a claim is even viable, especially the "pattern of racketeering activity" element. This will involve extensive investigation after the plaintiff is even made aware that he is subject of such conduct. It is not often possible to perform this work within the statute of limitations period if the statute begins to run at the first glimpse of criminal conduct and therefore such a statute should not begin to run in alleged ongoing racketeering enterprises. To do otherwise simply vitiates the ten year period Congress has allowed from the statute's inception for would be victims/future plaintiffs to investigate and discover viable RICO conduct and precludes the plaintiffs from obtaining appropriate relief. The appropriate statute of limitations should not be applied before a RICO action accrues. The petitioner, Mr. Vakalis has been severely injured by this inappropriate application of a common law doctrine to interpret and nullify a clear statutory provision.

Since conspiracy agreements which manifest themselves in ongoing racketeering activity can not have any last predicate act, the application of a statute of limitations to such conduct is impossible and the statute is therefore tolled until the conclusion of the enterprises' activities. Mr. Vakalis' action should not have been dismissed on this statute of limitations ground because the application thereof is in direct violation of settled Connecticut law and the federal equitable tolling doctrine.

The court below should have applied the Connecticut six year statute of limitations, because it has been applied to partnerships and it effectuates RICO's broad remedial policy more effectively than the three year statute used below.

For all the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of October, one thousand nine hundred and eighty-six.

Present:

HONORABLE RICHARD J. CARDAMONE

HONORABLE LAWRENCE W. PIERCE
Circuit Judges

HONORABLE DUDLEY B. BONSAL
*District Judge**

GEORGE VAKALIS,
Plaintiff-Appellant,

—against—

ORDER
Docket No. 86-7396

EUGENE M. KAGAN, JACK HEFLIN, ALLEN M. HEFLIN, COUNTRY CLUB ASSOCIATES, EAST STREET MALL ASSOCIATES, E. REUEL STOLTZ, CPA, SPITZ, SULLIVAN, WACHTEL & FALCETTA, INTERSTATE REGIONAL SHOPPING CENTERS, LTD., BERTRAM ROBINSON, HARLAND SHAPIRO, VSR ASSOCIATES, ELAINE G. KAGAN,
Defendants-Appellees.

George Vakalis appeals from a judgment dismissing his complaint against the appellees as being time-barred under the applicable state statute of limitations. The United States District Court for the District of Connecticut (Clarie, J.) entered the judgment on April 16, 1986.

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* Hon. Dudley B. Bonsal, Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

Vakalis sued the appellees on July 17, 1985 seeking legal and injunctive relief, alleging that the appellees violated various federal statutes, including the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* The only issues on appeal concern Vakalis's RICO claims. A recitation of the facts involved may be summarized briefly. The appellant and the appellees Eugene M. Kagan, Jack Heflin, Bertram Robinson, and Harland Shapiro were, in various configurations, partners in different companies (also named in the complaint) which developed shopping malls in New England. E. Reuel Stoltz and the firm with which he is associated, Spitz, Sullivan, Wachtel & Falcetta, acted as accountants to the partnerships. Elaine G. Kagan is the wife of Eugene Kagan. Vakalis has alleged that these appellees conspired to defraud him of his interests in the various partnerships. Following a motion for summary judgment based on the statute of limitations made by some of the appellees, the district court dismissed the complaint against all of them as being barred by the running of Connecticut's limitations period for common law fraud. The district court utilized this period because RICO does not itself contain a limitations period.

Appellant challenges the use of Connecticut's period for common law fraud rather than the six-year period provided for by Connecticut's provision for partnership accounting. *See Conn. Gen. Stat. Ann.* §§ 52-576 (accounting); 52-577 (fraud) (West Supp. 1986). It is well-settled that in RICO actions a district court will apply the most analogous state statute of limitations. *See e.g., Durante Bros. and Sons, Inc. v. Flushing National Bank,* 755 F.2d 239 (2d Cir.), *cert. denied,* 105 S. Ct. 3530 (1985). Because the predicate acts alleged consisted of fraudulent activities, the district court correctly utilized the limitations period for actions sounding in common law fraud.

When did the limitations period begin to run? We have held that the period commences when a plaintiff actually knows of the alleged fraud or facts which, in the exercise of

ordinary diligence, should have led to actual knowledge of the fraud. *See, ITT, An Intern. Inv. Trust v. Cornfeld,* 619 F.2d 909, 929 (2d Cir. 1980); *Robertson v. Seidman & Seidman,* 609 F.2d 583, 587 (2d Cir. 1979). As appellant himself admitted in his complaint, he learned of the fraudulent scheme in 1979 and 1980. Thus, the limitations period expired well before the filing of the complaint. Finally, appellant has not shown that the district court abused its discretion in failing *sua sponte* to grant him leave to amend his complaint or fortify it through discovery. *See Foman v. Davis,* 371 U.S. 178, 182 (1962).

The order is affirmed.

/s/ Richard J. Cardamone

Richard J. Cardamone, U.S.C.J.

/s/ Lawrence W. Pierce

Lawrence W. Pierce, U.S.C.J.

/s/ Dudley B. Bonsal

Dudley B. Bonsal, U.S.D.J.

N.B.! *Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.*

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GEORGE VAKALIS	:	
	:	
—vs—	:	Civil No. H-85-614
	:	
EUGENE M. KAGAN, ET AL.	:	

RULING ON MOTIONS TO DISMISS

This action invokes the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* The plaintiff, George Vakalis, a developer of commercial real estate, claims that the defendants defrauded him of his property through a series of business dealings. It is before the Court on several defendants' motions to dismiss. The Court finds that the plaintiff's claims are barred by the applicable statute of limitations and, accordingly, that the complaint must be dismissed.

Facts

The complaint in this case was filed on July 17, 1985. Ninety-seven pages in length, the complaint alleges, *inter alia*, that the defendants violated the provisions of the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* The plaintiff, who appears *pro se*, also complains of "fraud, fraudulent concealment, criminal conspiracy, negligent misrepresentation, breach of contract and conversion."

The complaint names as defendants Eugene M. Kagan; Jack Heflin; Allen M. Heflin; Country Club Associates [hereinafter CCA]; East Street Mall Associates [ESMA]; E. Reuel Stoltz, CPA; Spitz, Sullivan, Wachtel & Falcetta [the Spitz firm]; Interstate Regional Shopping Centers, Ltd. [IRSC]; Bertram Robinson; Harland Shapiro; VSR Associates [VSR]; and Elaine G. Kagan. The plaintiff alleges that the defendants

defrauded him in connection with various commercial real estate development partnerships:

> "On or about mid 1975 and during 1976 and 1977 through December of 1980 and thereon to the present . . . [the] defendants . . . unlawfully and willingly conducted the affairs of East Street Mall Associates, Country Club Associates, Interstate Regional Shopping Centers, Ltd., Rockingham Mall Associates [hereinafter RMA], and VSR Associates through a pattern of racketeering activity."

Among the acts complained of in the first and eleventh counts (the RICO counts) are attempts by Eugene Kagan, business partner and counsel to the plaintiff, to defraud the plaintiff by inducing him to expend time and money on behalf of the various partnerships, including shopping center projects in Westfield and Worcester, Massachusetts, and in Rockingham, Vermont. In connection with his RICO claim, the plaintiff lists a number of "racketeering acts," that is, use of the mails and telephone conversations "in furtherance of the scheme to defraud and to obtain monies and properties from Plaintiff George Vakalis by means of false and fraudulent pretenses, representations, and promises." These acts include fifty-nine instances of alleged mail fraud, *see* 18 U.S.C. § 1341, and thirty-five instances of alleged wire fraud, *see* 18 U.S.C. § 1343.

Counts two through eight and ten of the plaintiff's complaint invoke various sections of Title 18 of the United States Code, including § 1341 (mail fraud), § 1343 (wire fraud), § 2314 (transportation of stolen money), § 152 (concealment of assets from Title 11 creditor) and § 1952 (b)(2) (interstate travel in aid of racketeering enterprises). Count nine alleges a "trick scheme . . . as part of the on-going fraud scheme to force General Partner George Vakalis out of the Country Club Associates partnership in an effort to further conceal and cover up the actions of co-schemer Allen M. Heflin."

On December 9, 1985, this Court denied the plaintiff's motion to amend his complaint to cite in additional defendants and his motion to consolidate the instant case with an interpleader action pending before the United States District Court for the District of Massachusetts. The Court then denied, on March 19, 1986, the plaintiff's motion to reconsider the motion to amend.

The interpleader action is one of several closed or pending cases in state and federal courts in Connecticut and Massachusetts which involve the plaintiff and which are related to the subject matter in this lawsuit. For example, the plaintiff moved this Court on November 27, 1985 for a temporary restraining order enjoining proceedings in the Bankruptcy Court for this District, which proceedings had been brought by Shawmut Bank & Trust (one of the defendants named in the plaintiff's proposed amendment) against the plaintiff's wife. That motion was denied.

Also, the interpleader action pending in the District of Massachusetts involves claims to the proceeds from a judgment obtained by the plaintiff against several of the defendants in this case in Massachusetts Superior Court in 1983. Documents appended to the plaintiff's complaint in the instant case include his complaint in that state court action. Captioned *George Vakalis v. Eugene M. Kagan, Jack Heflin, and Allen Heflin,* Massachusetts Superior Court (at Worcester) Docket No. 80-18814, the complaint comprises, *inter alia,* allegations of fraud, deceptive trade practices, and breach of a partnership agreement. The special jury verdict and the judgment of the court in that case have also been appended to the plaintiff's complaint. They reveal that the plaintiff obtained a judgment of $362,934.30 against all three defendants on January 31, 1983 on Count IV of his complaint (alleging breach of a partnership agreement). A special verdict form with a series of interrogatories was submitted to the jury. The jury was asked: "Was there in connection with the partnership known as Country Club Associates any breach by the defendants Kagan and Heflin of any fiduciary duty as

partners owed by them to the plaintiff Vakalis?" The jury answered affirmatively.

Most of the defendants have moved to dismiss the present complaint on various grounds, as failing to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6). Eugene Kagan, Jack Heflin, Alan Heflin, CCA, IRSC, and Elaine Kagan have moved to dismiss on grounds of the statute of limitations as to all six defendants, on grounds of *res judicata* as to Kagan, Jack Heflin, and Alan Heflin, and on grounds of lack of a factual basis for the claims as to Elaine Kagan and CCA. Harland Shapiro has moved to dismiss on grounds of the statute of limitations and *res judicata*. ESM cites the same grounds for dismissal and also contends that there is no factual basis for the plaintiff's claim.

The three remaining defendants who have appeared (VSR has not appeared in the case), Bertram Robinson, E. Reuel Stoltz, and the Spitz firm, have not filed motions to dismiss but have answered the complaint.

Discussion of Law

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). It is also well established that "the pleadings of *pro se* litigants are not held to the same exacting standards as those drafted by lawyers." *Haines v. Kerner*, 404 U.S. 419, 420 (1972). In deciding a motion to dismiss under Rule 12(b)(6), the court must, of course, accept as true the allegations of the complaint. This is "especially true when the complaint is made pro se." *Moore's Federal Practice* § 12.07.

The Court notes that those counts of the complaint (two through eight and ten) which invoke various federal criminal statutes (in particular 18 U.S.C. §§ 1341 & 1343) do not state claims cognizable in a civil action. It is axiomatic that a

private plaintiff cannot prosecute a criminal charge; more specifically, no private cause of action exists under the mail and wire fraud statutes (18 U.S.C. §§ 1341 & 1343). *See, e.g. Ryan v. Ohio Edison Co.*, 616 F.2d 1170 (6th Cir. 1979). Accordingly, alleged violations of 18 U.S.C. §§ 1341 & 1343 are relevant in this case only to the extent that they satisfy the predicate acts requirement of 18 U.S.C. § 1961 (1).

Among the grounds urged by the moving defendants for dismissal of the plaintiff's complaint is the statute of limitations. Dismissal under Rule 12(b)(6) is proper if a "bar to relief is apparent from the face of the complaint, such as . . . the statute of limitations." *Moore's Federal Practice* § 12.07. In a RICO suit, the Court must look to the most analogous state law cause of action to determine the proper limitations period. In a case such as this one, alleging as predicate acts mail and wire fraud in furtherance of a scheme to defraud the plaintiff of his property, the Court finds that the analogous state law claim is one for common law fraud. *See Kirschner v. Cable/Tel Corp.*, 576 F. Supp. 234, 241 (E.D. Pa. 1983). The proper time period, therefore, is three years. *See* Conn. Gen. Stat. § 52-277.

The occurrence which triggers the running of the statute is that of the last predicate act, in this case one of mail or wire fraud. Most of the alleged predicate acts set out in the plaintiff's complaint occurred in 1979 and 1980.[1] No allegation is made of any such act occurring within three years from the filing of the complaint on July 17, 1985. Indeed, in Count 11 of the complaint, which details alleged "Rico violations against Eugene M. Kagan, Allen M. Heflin, Jack Heflin, Bertram Robinson, Harland Shapiro, and E. Reule [sic] Stoltz, Spitz, Sullivan, Wachtel & Falcetta, Country Club Associates, East Street Mall Associates, Interstate Regional Shopping Centers, Ltd., and VSR, Associates," the plaintiff acknowledges that he "discovered further the existence and extent of the major scope of the fraudulent scheme during late 1979 and 1980." At the latest, a cause of action for fraud accrues when the fraud is actually discovered or should reasonably have been discovered. *Umstead v. Durham Hosiery*

Mills, Inc., 578 F. Supp. 342, 348 (M.D.N.C. 1984). Hence it appears from the face of the complaint that the action is time barred. Although defendants E. Reuel Stoltz, the Spitz firm, and Bertram Robinson have not moved to dismiss the complaint, they have interposed as affirmative defenses to the plaintiff's claim the statute of limitations. The absence of a predicate act within the statutory period renders the complaint untimely as to these parties as well; it must be dismissed.

Were it not for the running of the statutory limitations period, the plaintiff's claim as to several of the defendants would nonetheless be precluded by the doctrine of *res judicata*. Although the Court must ordinarily confine itself to the face of the complaint in addressing a motion brought under Rule 12(b)(6), unless it chooses to transform the motion into one for summary judgment under Rule 56, the Court may examine documents submitted along with the complaint in deciding the propriety of dismissal. *Goldman v. Belden*, 754 F.2d 1059, 1065–66 (2d Cir. 1985). In this instance the plaintiff has appended to his complaint a copy of a complaint in an action brought in Massachusetts Superior Court in 1980, along with copies of the special verdict form and the judgment rendered in that litigation. It is apparent from the two complaints that the plaintiff's claim in this case against the state court defendants is precluded by the earlier proceedings.

When a party has obtained a final judgment on the merits, he cannot relitigate the issues which were, or might have been, adjudicated in the first instance in a second lawsuit. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 578–79 (1974); *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir. 1981). "Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel." *Commissioner v. Sunnen*, 333 U.S. 591, 597–98 (1948). This principle is in no way diminished when a federal court is asked to give preclusive effect to a state court judgment. *See, e.g., Migra v. Warren City School District*, 465 U.S. 75, 81 (1984). In applying the doctrine of claim preclusion to the facts of the case, the Court must inquire

> "whether a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action, whether the same evidence is necessary to maintain the second cause of action as was required in the first, and whether the essential facts and issues in the second were present in the first."

Herendeen v. Champion International Corp., 525 F.2d 130, 133-34 (2d Cir. 1975).

There can be little doubt in this case, but that the allegations of the instant complaint directed at defendants Allen Heflin, Jack Heflin, and Eugene Kagan represent nothing more than an attempt to resuscitate the claim that proceeded to judgment in Massachusetts Superior Court in 1983. In that complaint, as in this one, the plaintiff alleged a series of acts on the part of the defendants by which they deprived him of his interest in commercial real estate ventures in Worcester and Westfield Massachusetts. The jury in the Massachusetts action found in the plaintiff's favor on the fourth count of his complaint (directed verdicts having been entered against the plaintiff on the other three counts of that complaint and on all six counts of a consolidated action), which count alleged a breach of the defendants' fiduciary duty to the plaintiff, a duty growing out of their business partnership. The jury awarded Mr. Vakalis over $360,000 in damages. A different judgment in the instant action would clearly impair rights established in the earlier litigation. Moreover, although denominated a RICO claim, the instant action, as it pertains to the party defendants in the Massachusetts case, comprises the same "essential facts and issues" as that earlier litigation, and is therefore barred by the principles of *res judicata.*

Conclusion

The Court concludes that the plaintiff's claim is time barred as to all defendants. Moreover, principles of *res judicata* preclude this claim to the extent that it is addressed to Eugene

Kagan, Allen Heflin and Jack Heflin. The defendants' motions to dismiss are granted. The Court on its own motion dismisses the complaint as to the defendants Robinson, Stoltz, and the Spitz firm on grounds of the statute of limitations.

SO ORDERED.

Dated at Hartford, Connecticut, this 16th day of April, 1986.

/s/ T. Emmet Clarie

T. Emmet Clarie
Senior District Judge

Footnote

[1] Several dates appear among the enumerated predicate acts which would fall within the statutory period (#7, p. 37; #47, p. 85; #'s 87-89, p. 47). It is apparent from context that the former two dates are typographical errors. The latter three involve Shawmut Bank, which is not a party to this action.

Although several paragraphs of the complaint allege fraudulent acts to have occurred within the statutory period (i.e., after July 17, 1982), none of those allegations can be construed as predicate acts of racketeering activity sufficient to avoid application of the statute of limitations. (*See* ¶¶ 63, 64, 66, 100-103, 105, and 109).

THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO) 18 U.S.C. §§ 1961-1968, AS AMENDED

SECTION 1961. DEFINITIONS

* * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * *

SECTION 1962. PROHIBITED ACTIVITIES

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections[1] (a), (b), or (c) of this section.

* * *

§ 52-576. Actions for account or on simple or implied contracts

(a) No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section.

(b) Any person legally incapable of bringing any such action at the accruing of the right of action may sue at any time within three years after becoming legally capable of bringing the action.

* * *

§ 52-577. Action founded upon a tort

No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of.